

CITY OF MILWAUKEE

Form CA-43

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January 27, 2004

Ms. Michelle Nate
Department of Finance
Milwaukee Public Schools
P.O. Box 2181
Milwaukee, WI 53201-2181

Re: 2003 E-Rate Funding Contracting Issue

Dear Ms. Nate:

In December 2003, the Milwaukee Public School System ("MPS") received notice from the Universal Service Administrative Company that its Schools and Libraries Division ("SLD") was denying MPS' 2003 applications under the SLD's E-rate Program (the "Program") for funds to support MPS' E-rate eligible services. As the basis for its denials, the SLD stated that MPS did not, as is required by the Program's guidelines, have either an executed contract or a legally binding agreement in place with its selected vendors prior to February 6, 2003 – the closing date of the Program's application window (the "E-rate Deadline").

In a telephone conference on January 8, 2004, you asked our office to provide a legal opinion as to whether MPS had a legally binding agreement with its vendors prior to the E-rate Deadline. Pursuant to your request, we are offering the following opinion:

Under Wisconsin law, a contract can be formed even though the formal written notice of award has not been sent or the formal contract executed. This view on public contracting was first set forth over 70 years ago in the case of *L.G. Arnold, Inc. v. Hudson*, 215 Wis. 5, 254, N.W. 108 (1934), and was reaffirmed four decades later in *Nelson, Inc. v. Sewerage Commission of Milwaukee*, 72 Wis.2d 400, 241 N.W.2d 390 (1976), and *City of Merrill v. Wenzel Brothers, Inc.*, 88 Wis.2d 676, 277 N.W.2d 799 (1979).

In Wisconsin, competitive bidding requirements are intended for the benefit and protection of the public. They are designed to protect fraud, collusion, favoritism and improvidence in the administration of public business as well as to insure that the public receives the best work or supplies at the most reasonable price practicable. See *Aqua-Tech, Inc. v. Como Lake Protection & Rehabilitation Dist.*, 71 Wis.2d 541, 2239 N.W.2d 25 (1976).

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EXHIBIT

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Guided by such public policy considerations, Wisconsin is among those states which hold "that the acceptance of a valid bid by the proper municipal authorities, where all legal requirements are observed, constitutes a binding contract." *Merrill* at 686 citing 10 McQuillin, Municipal Corporations, s. 29.80 at 441 (3d ed. 1966). Moreover, a contract "may come into existence upon acceptance of a bid, even though as to certain formalities or details there has been a defective compliance with legal formalities or requirements." *Id.* at 686-687.

In the case at issue, it is our understanding that pursuant to its standard procurement procedures, MPS issued numerous Requests for Proposals ("RFPs") in 2003 for equipment and services that were eligible for reimbursement under the Program. The RFPs were posted on MPS' website, published in *The Daily Reporter*, and mailed to vendors who were on MPS' interested vendor list. Once received by MPS, the bid proposals were evaluated and scored by teams of 6 to 8 individuals.

Upon completion of the evaluations, the scores from each independent evaluator were totaled and the vendor with the highest score for each RFP was selected as the recommended 2003 vendor. Thereafter, MPS completed an application form (FCC Form 471) for each of the RFPs and submitted such applications to the FCC prior to the E-rate Deadline. In completing the applications, MPS listed the vendor it had selected for each of the respective RFPs.

It is also our understanding that formal written notices were not sent to the selected vendors notifying them of their selection. However, the selected vendors were given verbal notice of their selection when such vendors called MPS for feedback on their bid proposals. Further, it is our understanding that the Board did not formally approve the vendor selections until July 31, 2003, and the formal contract documents were not executed until several weeks thereafter.

In light of these circumstances, the issue of whether a legally binding agreement was in place before the E-rate Deadline hinges upon what point, under Wisconsin law, MPS accepted the offers made by the selected vendors in their respective bid proposals. Although none of the cases cited herein have identical circumstances, it is our opinion that a Wisconsin court could reasonably find that a legally binding agreement was formed at the point in time that the results of the evaluations were tallied and the "winning" vendors were selected.

In addition, our opinion is bolstered by MPS' overt act of listing the selected vendors on the Form 471s filed with the FCC. It is our belief that these Form 471s would have provided sufficient documentation for such vendors to have compelled MPS to execute the formal contract documents and similarly, have required such vendors to have performed such services or have provided such equipment as was set forth in the specifications of such vendors respective bid proposals. Therefore, we are of the opinion, that MPS had a legally enforceable agreement in place with each of its selected vendors prior to the E-rate Deadline.


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If you have questions regarding this opinion or require any further assistance in this matter, please feel free to contact us.

Very truly yours,



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